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ALEXANDER L. STEVAS,
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRED A. QUENZER,
Petitioner,

v.

NOLA KATHLEEN QUENZER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

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QUESTIONS PRESENTED

1. May Wyoming refuse to give full faith and credit under Article IV, Section 1 of the United States Constitution to a Texas custody decree merely because Texas and Wyoming do not have substantially similar jurisdictional prerequisites in custody cases?

2. May Wyoming refuse to give full faith and credit to a Texas custody decree under the provisions of the Parental Kidnapping Prevention Act because Wyoming disagrees with the Texas court's fact findings on the child's residency when that issue was fully litigated in the Texas court?

3. May Wyoming assume in personam jurisdiction over a Texas resident whose only contact with Wyoming is seeking recognition in the Wyoming courts of a Texas custody decree under the Full Faith and Credit Clause of the United States Constitution and the Parental Kidnapping Prevention Act?

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OPINIONS BELOW

The opinion of the Supreme Court of Wyoming is reported at 653 P.2d 295 and appears in the Appendix. The order of the Wyoming Supreme Court denying a petition for rehearing is unreported and is reproduced in the Appendix. The order of the District Court of Teton County, Wyoming, Ninth Judicial District, dated March 2, 1982 is unreported and is reproduced in the Appendix. The order of the 309th Judicial District Court of Harris County, Texas dated January 21, 1981 is unreported and is reproduced in the Appendix.

JURISDICTION

The opinion of the Supreme Court of Wyoming was rendered October 29, 1982. The order of the Wyoming Supreme Court denying petitioner's motion for rehearing was entered November 17, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article IV, Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

United States Code, Title 28, Section 1738A

The full text of this statute is appended to the opinion rendered by the Supreme Court of Wyoming.

Wyoming Statutes Revised, Section 20-5-109(b)

Unless required in the interest of the child and subject to W.S. 20-5-115(a), the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner without consent of the person entitled to custody has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court in its discretion and subject to W.S. 20-5-115(a) may decline to exercise jurisdiction.

Wyoming Statutes Revised, Section 20-5-114

The courts of this state shall recognize and enforce an initial or modification decree of a court of another state

which had assumed jurisdiction under statutory provisions substantially in accordance with this act, or which was made under factual circumstances meeting the jurisdictional standards of the act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this act.

Wyoming Statutes Revised, Section 20-5-115(a)

If a court of another state has made a custody decree a court of this state shall not modify that decree unless it appears that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this act or has declined to assume jurisdiction to modify the decree and the court of this state has jurisdiction.

STATEMENT OF THE CASE

Fred and Nola Kathleen Quenzer were married on June 12, 1969 in Tokyo, Japan. Two days later the couple moved to Houston, Texas where the husband went into medical practice. On April 20, 1970, their daughter Megan was born in Houston. The Quenzers spent their entire married life in the Houston area. On December 22, 1975, the Quenzers were divorced in the Court of Domestic Relations Number Two of Harris County, Texas. Under the divorce decree, Mrs. Quenzer was awarded custody of Megan, Dr. Quenzer was granted weekend and summer visitation privileges, and Dr. Quenzer was ordered to pay child support and contractual alimony.

Immediately after the divorce, Mrs. Quenzer left Texas with Megan. They moved to Colorado, to Washington, and then settled in Oregon in September 1976. As a result Dr. Quenzer was unable to exercise his visitation rights and did not return the child at the end of the summer visitation period. Mrs. Quenzer successfully prosecuted a habeas corpus action in Texas to obtain Megan's return.

In August 1977 Dr. Quenzer petitioned a circuit court in Oregon to enforce the visitation provisions of the Texas decree. Mrs. Quenzer filed a cross-petition seeking modification of the Texas decree and arrearages in child and spousal support payments. Dr. Quenzer then filed a motion for a change of custody. On July 7, 1978, the Oregon trial court continued custody with the mother and granted the mother a judgment for arrearages in support payments. The father did not appeal the custody determination but did appeal the money judgment. That judgment was affirmed by the Oregon Court of Appeals on September 4, 1979.

During the summer of 1979, Megan and Mrs. Quenzer traveled to Hawaii. In August Mrs. Quenzer married Jerry Sherrard. In September 1979, the three moved to Dillingham, Alaska, and later, in January, 1980, to Aleknagnik, Alaska. In June 1980, Megan went to visit her father in Texas for the prescribed summer visitation period. During the visit, the mother and Mr. Sherrard left Alaska for a visit to Wyoming. On July 8, 1980, during the prescribed summer visitation period, Dr. Quenzer filed a motion to modify in the 309th District Court of Harris County, Texas, Judge Alvin Zimmerman presiding, seeking a change of custody. Process was served on the mother in Oregon where she was visiting en route to Wyoming.

Mrs. Quenzer attempted to appear specially in the motion to modify proceeding. The mother also instituted a separate habeas corpus action in Judge Zimmerman's court seeking a return of the child pursuant to the Oregon decree. On August 8 and 15, 1980, Judge Zimmerman conducted the habeas corpus hearing. The Court heard the testimony of the mother, the father, the child, a school principal who had tested Megan, two psychiatrists and an

investigator who had been employed by the father to locate the child. The testimony focused on the child's living conditions with the mother and the mother's whereabouts since the divorce. Finding no immediate danger to the child, Judge Zimmerman granted the mother's petition for habeas corpus and returned the child to her mother's custody. Mrs. Quenzer then left Texas with Megan on August 16, 1980.

On October 15, 1980, Judge Zimmerman conducted a hearing on Mrs. Quenzer's motion for special appearance. At this hearing both Dr. Quenzer and Mrs. Quenzer were represented by counsel. Judge Zimmerman denied Mrs. Quenzer's special apearance. Dr. Quenzer's motion to modify was set for trial January 12, 1981. On that date Mrs. Quenzer was not present but her attorney was and participated throughout the trial. During that hearing, Judge Zimmerman heard the testimony of two psychiatrists retained by Dr. Quenzer, a school principal, Dr. Quenzer, Dr. Quenzer's second wife, a court-appointed psychologist, and a social worker appointed by the Court on motion of Mrs. Quenzer. Judge Zimmerman also considered the report of a Houston attorney whom Judge Zimmerman had appointed to go to Jackson, Wyoming to investigate the child's living conditions with Mrs. Quenzer. Judge Zimmerman also conferred by telephone with a psychologist in Wyoming who had examined Megan at Mrs. Quenzer's request. Judge Zimmerman also made a part of the record the testimony Megan had given in August 1980.

At the conclusion of the trial Judge Zimmerman ruled that the prior Texas and Oregon decrees should be modified and that the father should be awarded custody because changes in circumstances since the Oregon decree would make continued custody with the mother injurious

to the child's welfare. Judge Zimmerman also ordered Mrs. Quenzer to surrender possession of Megan to Dr. Quenzer by January 26. Judge Zimmerman found jurisdiction in the Texas courts to make these rulings in the following key passage of his modification order:

> "Respondent filed a Special Appearance. The Court having considered the pleadings, testimony of record, and all other relevant matters found it had jurisdiction and denied the Special Appearance. The Court further finds that at the time of the commencement of this suit, NOLA KATHLEEN was not a continuous domiciliary or resident of any state for six months preceding the filing of this action; that MEGEN KATHLEEN QUENZER was born on April 20, 1970 in Houston, Harris County, Texas; that the parties, NOLA KATHLEEN and FRED AUGUST QUENZER were granted a divorce in Houston, Harris County, Texas on the 22nd day of December, 1975 under cause number 1,035,983 as filed in the Court of Domestic Relations Number Two, Harris County, Texas captioned 'In the matter of the marriage of: FRED AUGUST QUENZER JR. and NOLA KATHLEEN QUENZER and in the interest of MEGEN ELIZABETH QUENZER'; that Texas was the last matrimonial Domicile of NOLA KATHLEEN and FRED AUGUST QUENZER; that NOLA KATHLEEN has been a transient for at least two years proceeding the filing of this cause; that no other court had or has continuing jurisdiction of this suit or the child, MEGEN KATHLEEN QUENZER, the subject of this suit. The Court finds it has jurisdiction of the child MEGAN KATHLEEN QUENZER, and that this Court is the most convenient forum to determine the best interest of the child MEGEN KATHLEEN QUENZER."

Judge Zimmerman's order was signed January 21, 1981. Mrs. Quenzer did not surrender the child on January 26. She did not appeal Judge Zimmerman's ruling. Instead, on February 23, 1981, while in contempt of the Texas order, she filed a complaint in the District Court of Teton County, Wyoming, Ninth Judicial District. Mrs. Quenzer's complaint and a later amended one *did not* allege that she should be awarded custody of Megan based on a change of circumstances that had arisen since the Texas order of modification. This would hardly be likely since the Texas decree had only been final for three days at that time. Rather, she alleged that the Wyoming courts were not bound to recognize the Texas order because Texas law did not substantially conform to the Wyoming enactment of the Uniform Child Custody Jurisdiction Act (UCCJA). The mother did ask the Wyoming court to recognize the 1978 Oregon decree and thereby award her custody. She also sought injunctive relief against the father, a revision of visitation provisions of the Oregon decree, and a judgment against Dr. Quenzer for arrearages in spousal and child support, and for attorney's fees.

Dr. Quenzer was served with Mrs. Quenzer's complaint in Houston. He proceeded to file a motion to dismiss the Wyoming action. Dr. Quenzer challenged Wyoming's jurisdiction of him personally and of the subject matter. His motion asked the Wyoming District Court to give full faith and credit to the January 12, 1981 Texas order, to recognize and enforce the Texas order, to recognize Texas as the more convenient forum, and to communicate with Judge Zimmerman. The District Court denied the father's motion, ruled that Wyoming did have jurisdiction, and ordered Dr. Quenzer to answer the com-

plaint. Rather than filing an answer, Dr. Quenzer petitioned the Wyoming Supreme Court for a writ of habeas corpus and a writ of prohibition. The petitions alleged that under the Full Faith and Credit Clause in Article IV, Section 1 of the United States Constitution, the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (PKPA), and the child custody laws of Wyoming, the Wyoming District Court must recognize the Texas order and should not assume jurisdiction of the case or proceed further. These petitions also sought a return of the child under the Texas decree. On August 12, 1981 the Wyoming Supreme Court denied the writ of habeas corpus and the writ of prohibition by holding that an appeal from an adverse judgment would be an adequate remedy for Dr. Quenzer to pursue his contentions.

In response to this ruling of the Wyoming Supreme Court, Dr. Quenzer filed a motion in the District Court on September 15, 1981 asking that a default judgment be entered against him so that he could appeal the issues of in personam jurisdiction and jurisdiction of the subject matter under state, federal and constitutional law. On October 8, 1981, the District Court denied this motion and ruled that Dr. Quenzer had entered a general appearance by his "requests for affirmative relief."

On March 2, 1982, the District Court in Wyoming entered its final order. Without so much as acknowledging that the Texas court had given custody to the father, the District Court held that Texas did not have jurisdiction to enter any modification of custody decree. Accordingly, the District Court ruled that it need not pass on any questions of full faith and credit or of federal law. The Court gave custody to the mother and denied the father visitation unless certain undefined safeguards were

established. The District Court also found that it had in personam jurisdiction over the father and entered judgment against him for arrearages in child support, medical payments, alimony, and attorney's fees. The father appealed the entire judgment to the Wyoming Supreme Court.

Contrary to the findings of the Wyoming District Court, the Wyoming Supreme Court held that Texas did indeed have jurisdiction under Texas law to enter the order awarding the father custody and that Judge Zimmerman's overruling of the mother's special appearance should not be disturbed. Nonetheless, the Wyoming Supreme Court affirmed the remainder of the District Court ruling on October 29, 1982. The decision of the Wyoming Supreme Court rests on three major premises relevant here:

1. Wyoming need not recognize the Texas custody determination under the Full Faith and Credit Clause of the United States Constitution because Texas did not assume jurisdiction under prerequisites substantially similar to those of Wyoming.

2. Wyoming need not recognize the Texas custody determination under PKPA because the Texas order was not made consistently with the provisions of the Act as required by 28 U.S.C. § 1738A(c).

3. Wyoming has in personam jurisdiction over Dr. Q nzer because his actions in the Wyoming courts had gone beyond a mere challenge to Wyoming's jurisdiction and had constituted a general appearance. Thus, the money judgment against him was proper.

Dr. Quenzer petitioned the Wyoming Supreme Court for rehearing on November 12, 1982; however, rehearing was denied November 17, 1982.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN CONFLICT WITH FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION. AS A RESULT, TWO DIFFERENT STATE COURTS HAVE REACHED CONFLICTING JUDGMENTS AS TO WHICH PARENT SHOULD HAVE CUSTODY OF THEIR MINOR CHILD.

The Wyoming Supreme Court rejected Dr. Quenzer's claim of full faith and credit under the United States Constitution because, in its view, Texas and Wyoming have established different jurisdictional prerequisites for a court to entertain an action for a change of custody. Sections 20-5-114 and 20-5-115(a), Wyoming Statutes Revised (1977) are modeled after Sections 13 and 14 of the UCCJA. Sections 20-5-114 and 20-5-115(a) basically require Wyoming courts to recognize, enforce, and not modify a custody decree of another state only if the other state assumed jurisdiction under standards and factual circumstances substantially in accordance with Wyoming law. "Consequently, if the issue in this case were confined to the enforcement of the Texas order it well might be that the doctrine of res judicata, combined with the provisions of our Wyoming law and the Parental Kidnapping Prevention Act, would require the recognition and enforcement of the Texas decree." 653 P.2d at 303. But the Wyoming Supreme Court observed that the UCCJA as adopted by Wyoming does not allow a Wyoming court to consider a modification of custody suit if the petitioning non-custodial parent retains physical

possession of the child beyond the time prescribed for visitation in the custody decree of another state. See Section 20-5-109(b), Wyoming Statutes Revised (1977), which is modeled after Section 8(b) of the UCCJA. The Wyoming Supreme Court noted that Dr. Quenzer had filed his motion to modify in Texas during a prescribed visitation period with Megan but had retained possession of her beyond that set forth in the Oregon decree. So under § 20-5-109(b), the father would not have been permitted under Wyoming law to pursue a change of custody action. Texas, however, has not adopted the UCCJA and does not have a statutory provision similar to Section 8(b) of the UCCJA. Thus, the Wyoming Supreme Court held that Wyoming courts need not enforce the Texas decree because the Texas decree was not entered under jurisdictional standards similar to those of Wyoming.

The Wyoming Supreme Court here ignored the Full Faith and Credit Clause of Article IV, Section 1 of the United States Constitution in ruling that Wyoming may disregard a Texas custody decree simply because Texas does not contain identical jurisdictional prerequisites to states which have adopted the UCCJA. The Wyoming Supreme Court cited no cases in support of its proposition that one state must give full faith and credit to another state's custody decree if and only if the two states have substantially equivalent procedural requirements. And the lower court's decision stands in direct opposition to the pronouncement of this Court in *Williams v. North Carolina*, 317 U.S. 287 (1942). There this Court held that under the Full Faith and Credit Clause, North Carolina could not refuse recognition of a Nevada divorce decree

simply because Nevada's prerequisites for divorce would offend the policy of North Carolina. There should not be a different rule for custody than for divorce.

If the decision below is permitted to stand, no UCCJA state would have to give full faith and credit to the custody decree of any non-UCCJA jurisdiction. See e.g., *Eicke v. Eicke*, 339 So.2d 1231 (La. Ct. App. 1981), *cert. denied*, 406 So.2d 607 (La. 1981), *cert. granted*, ___U.S.____, 102 S.Ct. 2232 (1982), *cert. dismissed*, ____U.S.____ [51 U.S.L.W. 3532, January 17, 1983]. But the issue is broader than a conflict between states which have adopted a version of the UCCJA and states which have not. Even in situations in which both states have purported to adopt the UCCJA, some states have refused to enforce other states' custody decrees because the second state believed that the first state had not satisfied the second state's procedural requirements. See e.g., *Williams v. Zacher*, 581 P.2d 91 (Ore. Ct. App. 1978) (Oregon refusal to enforce Colorado decree); *Baird v. Baird*, 374 So.2d 60 (Fla. Dist. Ct. App. 1979) (Florida refusal to enforce Arizona decree); *Webb v. Webb*, 245 Ga. 650, 266 S.E.2d 463 (1980), *cert. dismissed*, 451 U.S. 493 (1981) (Georgia refusal to enforce Florida decree). As long as "differing jurisdictional prerequisites" is the standard to deny full faith and credit, any state can devise a way not to recognize custody decrees of any other state. The result would be no full faith and credit in custody cases and total havoc for family law throughout the country.

II.

THE DECISION BELOW SERIOUSLY UNDERMINES THE EFFECTIVENESS OF THE PARENTAL KIDNAPPING PREVENTION ACT.

Congress passed the Parental Kidnapping Prevention Act (PKPA) in an effort to bring some stability to the law of interstate child custody disputes. Section 8 of PKPA requires that each state enforce and give full faith and credit to all custody determinations made by other states "consistently with the provisions of this section." 28 U.S.C. § 1738A(a). The Wyoming Supreme Court recognized as much but held that the Texas decree was not made "consistent with the provisions of this section" as that term is defined in 28 U.S.C. § 1738A(c). The Wyoming Supreme Court found that the Texas custody determination satisfied 28 U.S.C. § 1738A(c)(1) because the Wyoming Supreme Court acknowledged that Texas had jurisdiction under Texas law. But the Wyoming Supreme Court determined that the Texas ruling was not made consistently with 28 U.S.C. § 1738A(c)(2). The basis for its holding on this point is that when the Texas proceeding commenced, Alaska was the child's "home state" as defined in 28 U.S.C. § 1738A(b)(4) even though in pleadings filed in both Texas and Wyoming, Mrs. Quenzer alleged that prior to July, 1980 the child's home jurisdiction was Oregon, not Alaska. Thus, reasoned the court below, at the time Dr. Quenzer filed his motion for modification, only Alaska would have been able to enter a decree which Wyoming would then have to enforce under PKPA.

Judge Zimmerman found, however, that the mother had not been a continuous resident or domiciliary of any

state for the six months preceding the filing of Dr. Quenzer's action in July 1980 and that the mother had been a transient for the two years prior to the commencement of the Texas proceeding. These periods encompassed the time that the mother and child were in Alaska. Thus Judge Zimmerman determined that the child had no "home state," Alaska or otherwise. He also found that no other state had jurisdiction over her. These findings satisfy 28 U.S.C. § 1738A(c)(2)(B)(i). He also found that the child was born in Texas, that the parents were divorced in Texas, that all parties had lived in Texas during the marriage, and that the evidence showed a change of custody would be in the child's best interest. These findings satisfy 28 U.S.C. § 1738A(c)(2)(B)(ii).

Judge Zimmerman's findings that the mother was a transient, that the child had no home state, and that it would be in the best interest of the child for Texas to exercise jurisdiction over the child satisfy 28 U.S.C. § 1738A(c)(2)(D). So under Judge Zimmerman's fact findings, the Texas custody determination conformed to both 28 U.S.C. § 1738A(c)(2)(B) and 28 U.S.C. § 1738A(c)(2)(D) and under PKPA must be recognized by Wyoming. The Wyoming Supreme Court, however, evaded PKPA by simply refusing to accept Judge Zimmerman's fact findings. The Wyoming Supreme Court held that the child had been a resident of Alaska for at least six months prior to July 1980 whereas Judge Zimmerman had determined just the opposite.

A Texas court found the facts necessary for a custody determination consistent with PKPA. The Wyoming Supreme Court said that the Texas court had determined those facts incorrectly. This action of the Wyoming

Supreme Court could seriously impair the effectiveness of PKPA. If one state can go behind the facts underlying another state's custody order, then PKPA provides no assurance that one state's custody decree will be honored in any other state. PKPA was intended to limit the number of courts which can hear custody disputes. The decision below does just the reverse. PKPA can be a nullity if Wyoming can disregard a Texas decree simply because Wyoming disagrees with the fact findings of a Texas court after those facts were fully litigated in Texas.

The effectiveness of PKPA and the recognition of custody decrees in foreign states could also be jeopardized by the Wyoming Supreme Court's finding of in personam jurisdiction over Dr. Quenzer. *Kulko v. Superior Court*, 436 U.S. 84 (1978) was this Court's most recent decision concerning in personam jurisdiction in an interstate marital dispute. *Kulko* held that the California courts did not have jurisdiction over a New York father in the mother's action for child support when the father's only contacts with California consisted of allowing his children to live with their mother in California for a longer period than that prescribed in the separation agreement. The Court reached this conclusion by applying the often cited standard of *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945) and by determining that it would be offensive to "traditional notions of fair play and substantial justice" to subject Mr. Kulko to California jurisdiction on the basis of his contacts with that state.

Prior to the commencement of the Wyoming litigation here, Dr. Quenzer had fewer contacts with Wyoming than Mr. Kulko did with California. In fact, it is undisputed that prior to the filing of Mrs. Quenzer's complaint on

February 23, 1981, Dr. Quenzer had absolutely no contacts whatsoever with the State of Wyoming. Yet the Wyoming Supreme Court exercised in personam jurisdiction over Dr. Quenzer nonetheless and affirmed a money judgment against him.

The basis for this holding was that Dr. Quenzer had done more than merely ask the Wyoming courts to dismiss Mrs. Quenzer's complaint for lack of jurisdiction. Rather, Dr. Quenzer had taken "affirmative action" in the Wyoming courts and thereby converted his special appearance into a general one. Specifically, Dr. Quenzer asked the District Court to give full faith and credit to the Texas order and to recognize Texas as the more convenient forum. Furthermore, Dr. Quenzer applied for writs of habeas corpus and prohibition in the Wyoming Supreme Court not only challenging the lower court's jurisdiction but also seeking recognition of the Texas order under Constitution and under PKPA. Finally after the Wyoming Supreme Court denied these applications for extraordinary relief, Dr. Quenzer then asked the District Court to enter a default judgment against him so that he could appeal the jurisdictional, PKPA and full faith and credit issues to the Wyoming Supreme Court. In the view of the Wyoming Supreme Court, by these actions Dr. Quenzer was seeking the protection of the Wyoming courts; therefore, it would be fair to find jurisdiction over him personally in Wyoming.

All of Dr. Quenzer's "affirmative action" in the Wyoming courts had one central theme—to ask for recognition and enforcement of the Texas order under the Full Faith and Credit Clause of the Constitution and under the Congressional effort to implement that clause through PKPA. The issue, in the framework of *Kulko*, is whether it

offends "notions of fair play and substantial justice" for a state to impose in personam jurisdiction over an out-of-state parent who enters a foreign state to seek enforcement of a custody decree. This is a question that has never been addressed by this Court and could have significant implications for the effectiveness of PKPA. If a parent must submit himself to the in personam jurisdiction of a foreign court when seeking enforcement of a custody decree, then many parents will be deterred from vindicating custody determinations under PKPA. Such a state of affirs would encourage the kidnapping that PKPA was designed to prevent.

CONCLUSION

For these reasons, this Court should grant a writ of certiorari to review the decision of the Supreme Court of Wyoming.

Respectfully submitted,

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